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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 408

PAN ATLANTIC STEAMSHIP CORPORATION, APPELLANT

v.

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.

No. 424

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the three-judge United States Court for the District of Massachusetts (R. 30–31) is reported at 144 F. Supp. 53. The concurring statement of Judges Wyzanski and Ford appears on page 54. The opinion of the United States District Court for the District of Massachusetts in *Stone's Express, Inc.* v. *United States*, held by the District Court to be

controlling in this case, is reported at 122 F. Supp. 955. No opinion, other than the findings in its order, was entered in this matter by the Commission. A copy of this order of October 28, 1955, which is in issue, is attached hereto as appendix A.

JURISDICTION

The jurisdiction of the Court upon appeal rests on 28 U. S. C. 1253 and 2325. The Commission is appealing as an intervening defendant pursuant to 28 U. S. C. 2323 and 2101 (b).

The final judgment of the District Court was entered on May 25, 1956 (R. 32–33). Notice of Appeal by the Commission was filed in the District Court July 17, 1956 (R. 37). Probable jurisdiction as to the Commission's appeal was noted November 19, 1956.

STATUTES AND REGULATIONS INVOLVED

Section 311 (a) of the Interstate Commerce Act (49 U. S. C. 911 (a)):

> To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier by water or a contract carrier by water, as the case may be. Such temporary authority shall be valid for such time as the Commission shall specify but not for more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

Section 2 (e) of the Administrative Procedure Act (5 U. S. C. 1001 (e)):

> (e) *License and Licensing.*—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

Section 9 of the Administrative Procedure Act (5 U. S. C. 1008):

> SEC. 9. In the exercise of any power or authority—
>
> (a) *In General.*—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.
>
> (b) *Licenses.*—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulnes or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee

> by the agency in writing and the license shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements: *In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.* [Emphasis added.]

Regulations prescribed by the Commission governing the extension under the last sentence of section 9 (b) of the Administrative Procedure Act of water carrier temporary operating authorities issued under section 311 (a) of the Interstate Commerce Act are published in the Code of Federal Regulations, Title 49, Part 2, sections 2.1–2.4 and are set forth in appendix B.

QUESTION PRESENTED

Whether the last sentence of section 9 (b) of the Administrative Procedure Act extended or authorized the Commission to extend beyond 180 days, and until the determination of the certificate application, a temporary authority issued to Pan-Atlantic Steamship Corporation under section 311 (a) of the Interstate Commerce Act authorizing operations as a common carrier by water, where the common carrier operation is of a continuing nature and Pan-Atlantic had filed a timely and sufficient application for a certificate of public convenience and necessity to continue the same operations conducted under the temporary authority, which application had not been determined by the

Commission upon the expiration of the 180 days of temporary authority.

STATEMENT OF THE CASE

The Commission, upon finding an immediate and urgent need for the service, by order dated May 18, 1955, issued to Pan-Atlantic Steamship Corporation, under authority of section 311 (a) of the Interstate Commerce Act, temporary authority to engage in operations in interstate and foreign commerce, as a common carrier by water, between various ports of the United States, for a period of 180 days, to expire on November 14, 1955 (R. 9–10). Pan-Atlantic, on or about May 5, 1955, had filed with the Commission under section 309 (e) of the Interstate Commerce Act (49 U. S. C. 909 (e)) an application for a permanent certificate of public convenience and necessity to engage in common carrier operations which included those authorized by the temporary authority (R. 4–5). The Commission was unable to conclude the proceedings on the application for a certificate of public convenience and necessity before the expiration of the temporary authority (R. 11, 14). Accordingly, Division 4 of the Commission, by order dated October 28, 1955, authorized Pan-Atlantic to continue to perform the water carrier service authorized by the temporary authority until the further order of the Commission, but not beyond the time the application for a permanent certificate of public convenience and necessity had been finally determined (R. 14–15). A petition by the appellees for reconsideration by the entire Commission of this order of Division 4 was

denied by order of the Commission dated January 9, 1956 (R. 18).

The Commission, in authorizing Pan-Atlantic to continue beyond 180 days, the same operations authorized by the temporary authority, determined that the operation was of a continuing nature and that Pan-Atlantic had filed a sufficient and timely application, within the meaning of section 9 (b) of the Administrative Procedure Act (R. 14–15). Accordingly, the Commission concluded that it was authorized and required by the last sentence of section 9 (b) of the Administrative Procedure Act to permit the continuance of the operations established under the temporary authority until the pending application for permanent authority had been finally determined.

Appellees instituted this action in the United States District Court to vacate, annul, and set aside the Commission's order of October 28, 1955, which authorized the continuance of operations by Pan-Atlantic pending the conclusion of the proceedings on the application for a certificate of public convenience and necessity. Appellees intended that this order of October 28, 1955, was not authorized by section 9 (b) of the Administrative Procedure Act or any other provision of law (R. 7).

The District Court held that the case was ruled, in principle, by the prior decision of that court in *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955 (1954), and that "with the usual deference to precedent common in this court" it would adhere to the conclusion reached in that case. In a concurring statement, two of the three judges constituting the

District Court stated that were they not, as they conceived it, bound by the prior ruling in the *Stone's Express* case, *supra,* they would conclude that "by virtue of § 9 (b) of the Administrative Procedure Act, 60 Stat. 242, the Interstate Commerce Commission did not act *ultra vires* in entering its order of October 28, 1955." One of the judges joining in this concurring statement had participated in and approved the conclusion in the *Stone's Express* case, *supra.* (R. 30–31.)

In *Stone's Express, Inc.* v. *United States, supra,* the District Court held that section 9 (b) of the Administrative Procedure Act did not authorize the Commission to extend a similar, but not identical, temporary authority (issued under section 210a (b) of the Interstate Commerce Act (49 U. S. C. 310a (b)) beyond the 180-day limit upon such grants stated in section 210a (b). An appeal from that decision was taken to this Court, which noted probable jurisdiction. *Interstate Commerce Commission* v. *Stone's Express, Inc.,* 348 U. S. 886. That appeal became moot before it was decided by this Court, by the final determination of the permanent authority application by the Commission. Upon stipulation of the parties, the case was remanded to the District Court for dismissal as moot. 350 U. S. 906.

SUMMARY OF ARGUMENT

Admittedly, the Commission, acting solely under the authority of section 311 (a), may not authorize operations for a longer period than 180 days. It is

our position, however, that the 180-day limitation in section 311 (a) is merely a limitation upon the power of the Commission when acting under section 311 (a) and that it does not limit or impair the power of the Commission to authorize other or further operations where authority to do so is conferred by other provisions of law, i. e., that this limitation does not prevent the Commission from exercising any authority that may be conferred upon it by other statutes such as section 9 (b) of the Administrative Procedure Act. It is further the view of the Commission that section 9 (b) clearly authorizes and requires it to allow continuances of operations (including those established under temporary authority issued under section 311 (a)) wherever the facts specified in the last sentence of section 9 (b) exist. We contend that there is no conflict between the 180-day limitation in section 311 (a) and the requirements of the third sentence of section 9 (b), but should the court perceive such a conflict, that conflict should be resolved in accordance with the obvious intent of the two provisions by giving effect to the 180-day limitation except in the specific instances within the scope of the section 9 (b) provisions, and in such instances, give effect to the clearly expressed intent of that provision to protect licenses in the specified circumstances.

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ARGUMENT

I. Section 9 (b) of the Administrative Procedure Act empowers the Commission to issue a temporary water carrier authority during the pendency of an application for a permanent certificate of public convenience and necessity, without regard to the 180 day limitation in Section 311 (a) of the Interstate Commerce Act

A. Section 311 (a) empowers the Commission to authorize urgently needed water carrier service pending the determination of an application for a certificate of public convenience and necessity

Section 311 (a) of the Interstate Commerce Act (49 U. S. C. 911 (a)) became law on September 18, 1940, as a part of the Water Carrier Act, Part III of the Interstate Commerce Act (49 U. S. C., Chapter 12). It is similar to and was patterned after section 210a (a) of Part II of the Interstate Commerce Act (49 U. S. C. 311a (a)) applicable to motor carriers. The purpose of section 311 was stated in the Report of the House Committee on Interstate and Foreign Commerce on the Transportation Act of 1939 (House Report 1217, 76th Congress, 1st Session), as follows:

> This section permits the Commission to authorize temporary operations by water carriers to meet immediate and urgent needs, and in cases where delays occur in connection with the determination of applications for consolidations and mergers. It is comparable to section 210a of part II.

No provisions for the grant of temporary operating authority were included in the Motor Carrier Act, 1935 (49 U. S. C., Chapter 8). It was soon discovered, however, that this omission was a serious deficiency in the statute. Situations arose in which

there was an immediate and urgent need for service which the existing carriers were unable to provide. The Commission was unable to authorize immediate service because of the procedures required for the issuance of permanent certificates and permits. The matter was brought to the attention of Congress and in 1938 section 210a was added to the Motor Carrier Act. The Commission, in its letter of February 28, 1938, to the Senate and House of Representatives (Senate Document 154, 75th Congress, 3d Session) explained the need as follows:

TEMPORARY GRANTS OF AUTHORITY

> As the act now stands, it is necessary, before new operations of a motor carrier can be undertaken, to obtain from the Commission a certificate of public convenience and necessity, if the proposed operations are those of a common carrier, or a permit, if they are those of a contract carrier. The act provides, also, that before we grant such a certificate to a common carrier, proof that the contemplated operations are required by the present or future public convenience and necessity must be presented, and somewhat similar proof must be presented before we can grant such a permit to a contract carrier.
>
> Some considerable time is necessarily required for the procedure entailed by a public hearing and decision of the issues there presented. The act now contains no provision enabling us speedily to grant temporary operating authority to meet an emergency, pending such formal determination of the matter. We

believe that we should have power to make such temporary grants.

* * * * *

Because of this experience in the regulation of motor carriers, when the bill providing for the regulation of water carriers was enacted in 1940, a provision similar to that in section 210a was included as section 311 (a). In each instance, the objective was the same, to provide, in the public interest, for service where there existed an immediate and urgent need which could not be supplied by the existing carriers. Service is authorized under these provisions (1) where the need will exist for only a short period of time (for even a single cargo or a single truckload) or (2) to allow service urgently needed by the public pending the determination of an application for a permanent certificate of public convenience and necessity. Where the evidence indicates an immediate and urgent need for a definite period which is less than 180 days, the Commission grants temporary authority for the period of the need and the operation is not regarded as of a continuing nature beyond that period, within the meaning of section 9 (b). Where it appears that the need will continue for an indefinite time, at least beyond 180 days, temporary authority is granted for the maximum period of 180 days. At the end of that period, if a sufficient and timely application for a certificate of public convenience and necessity has been filed and has not been determined, the Commission will consider whether the need continues and, if so, authorize the continu-

ance of the operation until the conclusion of the application for a certificate. 49 C. F. R. 2. 1–2.4. This interpretation is similar to the interpretation of section 9 (b) by the Civil Aeronautics Board. 14 C. F. R., part 290.

Where there is an immediate need for service, an applicant may file, simultaneously an application for a permanent certificate of public convenience and necessity and an application for temporary authority. In other circumstances, the application for a certificate may be filed either prior or subsequent to the filing of an application for, or the granting of, temporary authority. There is no requirement in section 311 (a) that either shall be filed before the other.

In *Kansas City & Leavenworth Transp. Co.* v. *United States*, 51 F. Supp. 916, 920, the three-judge District Court commented on the meaning and purpose of section 210a (a) in the words quoted below. Because of the similarity between that section and section 311 (a), the remarks are equally applicable to the latter section:

> Second, we think that section 210a (a) must be considered in the light of section 207 (a). Under the latter section applications for certificates of authority are based on "present and future" public convenience and necessity. There is no requirement of proof of permanent public convenience and necessity. Considering the two sections and what each was designed to accomplish, we think Congress, in its experience, saw that public convenience and necessity would at times become so urgent as to require transportation facilities without waiting for

hearing and decision under section 207 (a). Accordingly, it enacted section 210a (a), which provides for the issuance of a certificate for immediate need. Such immediate necessity is designed to cover that period which may elapse before the Commission issues a certificate under section 207 (a).

At the time section 210a was enacted, it was thought that a period of 180 days would be a sufficient time within which to determine applications for certificates and permits. The same thought was followed when section 311 was enacted. It developed, however, that some proceedings could not be determined within that time, particularly contested applications involving extensive operations, of which the present application of Pan-Atlantic may be cited as an example. The situation was relieved by the Second War Powers Act, 1942, which, effective March 27, 1942, amended sections 210a (a) and 311 (a) by striking out the words, "but not for more than an aggregate of one hundred and eighty days." By the terms of this Act these amendments were to remain in effect only until December 31, 1944, on which date they were to cease to be in force and any statutory provisions amended thereby were to be in full force and effect as though the Act had not been enacted (56 Stat. 176, 187). This amendment was extended by the amendment to the Second War Powers Act of December 20, 1944, and was further extended by the amendment of June 29, 1946, which provided that these amendments shall remain in effect until March 31, 1947 (50, App. U. S. C. 645; 60 Stat. 345). On the last mentioned

date, the clauses limiting grants to 180 days again became a part of sections 311 (a) and 210a (a).

Before this amendment to section 311 (a) by the extension of the Second War Powers Act expired on March 31, 1947, the Administrative Procedure Act, including section 9 (b), had been enacted on June 11, 1946, and section 9 (b) had become effective 90 days thereafter, September 9, 1946 (5 U. S. C. 1008 and 1011). The Commission has extended many temporary authorities issued under sections 210a (a) and 311 (a) under the authority of section 9 (b) of the Administrative Procedure Act, but only in those instances in which the facts satisfied the conditions stated in the third sentence of that subsection.

The question of allowing the continuance of operations pending the judicial review of decisions of the Commission, where the carrier has been operating under a temporary authority, also is involved. The combined time required for the Commission proceeding on an application for a certificate and the time required by the courts for the judicial review of such a decision almost inevitably will exceed the 180 days of operation allowed by section 311 (a). The courts have no authority to issue certificates or temporary authorities (United States v. Carolina Carrier Corporation, 315 U. S. 475, 489–490) and unless authority for such continuance exists under section 9 (b), the operation must discontinue at the end of 180 days regardless of a pending judicial review proceeding.

The Commission exerts every effort to determine all applications for certificates and permits within

the shortest possible time. Despite these efforts, a large number (but small in terms of percentages) cannot be determined within the period of 180 days of temporary authority. To require the applicants in such cases to discontinue the operations conducted under the temporary authority until the application for permanent authority can be determined, often would be serious or even disastrous to the carrier, but more important it would require the discontinuance of service to shippers for which the Commission has found that there is an immediate and urgent need which cannot be satisfied by other existing carriers. Such a result would be contrary to the purpose and intent of the Interstate Commerce Act which is, as stated in the Congressionally declared National Transportation Policy (49 U. S. C. preceding § 1), to provide transportation adequate to meet the needs of the commerce of the United States, of the Postal Service, and national defense.

B. Section 9 (b) of the Administrative Procedure Act protects licensed activities of a continuing nature from interruptions arising out of the determination of applications for new licenses

The comprehensive language of the definition of "license" and "licensing" in section 2 (e) of the Administrative Procedure Act makes clear that every form and character of permission required by law to engage in any activity, or even to perform single acts, was intended to be included. The definition of "license" is quoted for convenience:

SEC. 2. As used in this Act—

* * * * *

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.

* * * * *

There is no indication in section 2 (e) or elsewhere in the Administrative Procedure Act that this definition does not include temporary operating authorities of the character authorized by section 311 (a) of the Interstate Commerce Act. The plain words of the definition inevitably lead to the conclusion that these temporary authorities are "licenses" within the definition in section 2 (e).

In the third sentence of section 9 (b) of the Administrative Procedure Act the word "license" is used without any explanation, definition, or qualification, and, therefore, must be taken to have the meaning given in the definition in section 2 (e). Temporary authorities issued under section 311 (a) are term licenses with expiration dates, such as seems to have been contemplated by the words, "No license * * * shall expire", used in section 9 (b).

The language of section 9 (b), "no license * * * shall expire" shows that Congress was intentionally dealing with licenses which because of a limitation as to time otherwise would expire on a fixed date. There is nothing in the language of the provision or in the legislative history which indicates that Congress did not intend this protection to licensees to be effective where a limitation upon the term of a grant was

specified in a statute such as section 311 (a). It will be noted that the discretionary withdrawal of licenses by the agencies was dealt with in the second sentence of section 9 (b). On the other hand, the language in the statute and the legislative history indicates a resolute intent that licensees shall be protected in the situations described in the statute, regardless of limitations in individual statutes or in regulations.

This intent was shown early in the consideration of the Administrative Procedure Bill by the following statement in the Senate Judiciary Committee Print, June 1945 (Legis. His. A. P. A.,[1] p. 35):

> This subsection is designed to ameliorate the difficulties where private parties are required to secure licenses. The first sentence requires that applications be determined promptly. The second sentence is designed to preclude the withdrawal of licenses, except in cases of wilfulness or the stated cases of urgency, without affording the licensee an opportunity for the correction of conduct questioned by the agency. Similar provisions are now contained in the banking statutes, except that the latter provide in addition that stated periods of time—sometimes more than one period of warning—shall elapse prior to the revocation of the equivalent of licenses [citation of statutes]. *The third sentence automatically extends a license in any case in which the licensee has made timely application for renewal but the granting agency fails to act prior to the expiration of the exist-*

[1] Legislative History, Administrative Procedure Act, Senate Document 248 of the 79th Congress, 2d Session. This document will hereinafter be cited as "Legis. His. A. P. A."

ing license. A similar provision is contained in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1 amending secs. 154–167 of the General Code: Amended substitute Senate Bill No. 36). [Emphasis added.]

Senator McCarran, in explaining the Administrative Procedure Bill to the Senate, stated concerning section 9 (b):

> In businesses of a continuing nature, no license is to expire until timely applications for new licenses or renewals are determined by the agency (Legis. His. A. P. A., p. 323).

Representative Walter, in explaining the Administrative Procedure Bill to the House of Representatives, commented on section 9 (b) in the following words:

> Section 9 (b) deals with licensing. It requires agencies to determine promptly all applications for licenses, prohibits them from withdrawing a license without first giving the licensee notice and an opportunity to achieve compliance except in cases of obvious wilfulness or emergency, *and in a business of a continuing nature precludes any license from expiring until timely applications for new licenses or renewals have been determined.*
>
> These special provisions are necessary because of the very severe consequences of the conferring of licensing authority upon administrtive agencies. The burden is upon private parties to apply for licenses or renewals. *If agencies are dilatory in either kind of application, parties are subjected to irreparable injuries unless safeguards are provided.* The purpose of this section is to remove the threat

> of disastrous, arbitrary, and irremediable administrative action (Legis. His. A. P. A., p. 368). [Emphasis added.]

That the Administrative Procedure Act was intended to supersede existing law and limitations to the extent necessary to enable agencies to comply with its requirements is made clear by section 12, which states:

> Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise.

It is submitted that the language of section 9 (b) that, "no license * * * shall expire," is either a self operating provision which automatically extends licenses in the circumstances specified, or it is a grant of authority to the agency and a command that it make effective the requirement.

It is the view of the Commission that the last sentence of section 9 (b) is a command directed to the agencies. The operations must be of a continuing nature, there must have been filed a timely and sufficient application to continue the same operation, and the application for the new or extended license must not have been finally determined. These are matters which the administrative agency is specially qualified to determine. Also, for purposes of the general administration of the Interstate Commerce Act it is necessary that the Commission know, and have established of record, what carriers are entitled to engage in operations subject to its jurisdiction. This does not mean that the Commission has discretion to deny the benefits of section 9 (b) where the facts stated

as a requisite in that section are found to exist. It is the orderly procedure for determining the issues involved, subject to judicial review as provided by law.

C. When licensed activities are of "a continuing nature", Section 9 (b) supersedes the 180 day limitation of Section 311 (a)

It is our contention that there is no conflict between the 180-day limitation in section 311 (a) of the Interstate Commerce Act and the last sentence of section 9 (b) of the Administrative Procedure Act. The limitation in section 311 (a) is stated in the following words:

> Such temporary authority shall be valid for such time as the Commission shall specify but not for more than an aggregate of one hundred and eighty days, * * *.

The policy under parts I, II, III and IV of the Interstate Commerce Act always has been to provide, generally, for the issuance of certificates of unlimited duration and thereby encourage investments in transportation enterprises by offering protection against the possible loss of operating rights which might occur if certificates were required to be renewed at periodic intervals. It was natural, therefore, that when it became necessary to add temporary authority provisions to meet immediate and urgent needs there would be a limitation upon the time for which temporary authorities may be issued in order to prevent a general evasion of the certificate requirements through the use of the temporary authority provisions. As previously pointed out, it was found that the exigencies of litigation prevented some certificate application proceedings from being concluded within the specified 180

days. In such instances, it would be necessary for the carrier furnishing the service under a temporary authority to discontinue at the end of 180 days, leaving the public without service unless some other person applied for and obtained temporary authority to furnish service. The original operator, if successful in his application proceeding, would resume operations upon the conclusion of the application proceeding. Relief in such situations was afforded by the Second War Powers Act, effective March 27, 1942, which removed the limitation from the temporary authority provisions until after the Administrative Procedure Act became law.

This time limitation in section 311 (a) does not in any way impair or affect the authority or jurisdiction of the Commission to take any action or to allow any operation where authority therefor is contained in another provision of the Interstate Commerce Act or in another statute such as section 9 (b) of the Administrative Procedure Act. The Commission, obviously, is not prevented from issuing a certificate under other provisions of the Interstate Commerce Act which allows the applicant to continue after 180 days the same operations it was conducting under a temporary authority. For the same reason, permission to continue operations beyond 180 days, pursuant to section 9 (b) of the Administrative Procedure Act, is not a violation of the limitation in the temporary authority provision. There is no violation nor any conflict between these provisions because each permission is authorized by a different provision of law and for different reasons. Under the temporary authority

provisions of the Interstate Commerce Act, the primary objective is to serve a public need for transportation. The purpose of section 9 (b) of the Administrative Procedure Act is to protect a person engaged in a licensed undertaking from the damage that it may suffer from being compelled to discontinue a business of a continuing nature, only to resume it after the administrative proceeding is concluded. Congress determined by the Administrative Procedure Act to give that degree of protection to persons compelled to obtain licenses to engage in a business. The effect of this Administrative Procedure Act provision coincides with the objectives of the Interstate Commerce Act.

If, contrary to our contentions, the court should perceive a conflict between these statutory provisions, it is submitted that the conflict should be resolved by giving effect to the provisions of the Administrative Procedure Act in those situations in which it was intended to apply because it is the latest conceived and expressed intent and because it is a more specific and limited statute applying to specifically defined and limited situations. In this connection section 12 of the Administrative Procedure Act (5 U. S. C. 1011) provides:

> Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.

It thus, in substance, says that it supersedes all statutes in conflict therewith to the extent necessary to comply with its requirements and that no future statute shall be construed to repeal its provisions by implication. This court, in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, after discussing the circumstances which led to the enactment of the Administrative Procedure Act, stated, at pages 40–41:

> Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.

Other similar statements discussing the Construction of the Administrative Procedure Act in connection with other statutes appear in *Marcello* v. *Bonds,* 349 U. S. 302, 310; *Shaughnessy* v. *Pedreiro,* 349 U. S. 48. 51; and *Marine Engineers' Beneficial Assn. No. 13* v. *N. L. R. B.,* 202 F. 2d 546, C. C. A. 3d (1953) (Certiorari denied, 346 U. S. 819).

Other interested parties who may object to the continuance of such operations in this way are entitled to their remedies under the law if any such application proceeding is unlawfully delayed. The first sentence of section 9 (b) states:

> In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted

> pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision.

Section 10 (e) of the Administrative Procedure Act states:

> It [the reviewing court] shall (A) compel agency action unlawfully withheld or unreasonably delayed; * * *.

In *Stone's Express, Inc.* v. *United States, et al.*, 122 F. Supp. 955, relied upon by the court below, the court interpreted the language of section 9 (b) of the Administrative Procedure Act as requiring that the applicant for an extension of a license or for a new license be a licensee at the time the application for an extension is filed.

We most respectfully contend that this interpretation of section 9 (b) is not warranted. We have searched the legislative history and we have found no indication of an intention to make the technical point, whether the applicant was a licensee at the time he filed the application for a new license, the determining fact as to whether the protection afforded by the third sentence of section 9 (b) shall be given or denied. The quotations from the legislative history heretofore given, in our opinion, show that the legislators had in mind and were determined to protect any licensee from having to discontinue a business because of the lapse of the license under which he was operating, if he had made a timely and sufficient application which the agency had failed to determine by the time the existing license would expire.

The court quoted from the Senate Judiciary Print of June 1945 (Legis. His. A. P. A. p. 35) the significant parts of the statement concerning the third sentence of section 9 (b), including the statement that, a "similar" provision is contained in the licensing procedure act of the state of Ohio. It then quoted the Ohio statute. We respectfully submit that while the language in the Ohio statute which the court italicized, "held by said licensee at the time said application was made" possibly may warrant the conclusion stated by the court, this language was not incorporated into section 9 (b). The statement of the Senate Committee that a "similar" provision was in an Ohio statute does not warrant the conclusion that the two statutes are, or were intended to be, "identical". If identity had been intended, presumably the same language would have been used.

We further respectfully contend that the language of the statute does not require and, in our opinion, does not warrant, the interpretation made by the court and that to express the meaning stated by the court requires the interpolation of words into the statute. The statute states:

> In any case in which the licensee has, * * * made timely and sufficient application * * *.

In order to express the meaning given by the court, the language should be:

> In any case in which the licensee [at the time he was such] has, * * * made timely and sufficient application * * *.

It appears to us that, at the most, there is an ambiguity in the language as to whether the applicant must have been a licensee at the time he filed for the

permanent or new authority. But that ambiguity, if it exists, should be resolved in the light of the context, the nature and the purpose of the provision, and not according to the existence or non-existence of a fact which it is difficult to believe the drafters of the provision would have considered relevant to the purpose of the provision. The statute speaks as of the expiration date of the license.

We submit, therefore, that the construction of section 9 (b) which we have heretofore presented is that intended by the legislators and is the correct legal construction.

The court made a further point, which we hope we have fairly summarized as follows: The opinion refers to the defendants as contending, in effect, that the third sentence of section 9 (b) repealed section 210a (b) by implication. It then says that the Supreme Court has stated that a statute will not be held to repeal a prior statute by implication unless no other reasonable construction is possible; that the intention of the legislature to repeal must be clear and manifest; that there must be a positive repugnancy between the provisions of the old and the new law. The opinion then states:

> We find no such repugnancy between the provisions of § 210a (b) and 9 (b). Section 210a (b) in clear and unambiguous terms states that the Commission may grant temporary approval for a period *not exceeding 180 days*. In holding that the third sentence of § 9 (b) does not apply to the temporary approval granted to St. Johnsbury, we are, therefore, following the well

established rule of giving effect to both statutes covering the same general subject matter. *United States* v. *Borden, supra.*

We do not contend that the third sentence of section 9 (b) repealed by implication the 180 day limitation in section 210a (b), section 210a (a) or section 311 (a). We contend that the third sentence of section 9 (b) is a new grant of authority and a new rule not in conflict with section 311 (a). If, however, there is any measure of conflict between section 9 (b) and section 311 (a), section 9 (b) must be regarded as having modified or qualified section 210a (b) and 311 (a), and all other statutes, where there arises the specific circumstances and conditions stated in section 9 (b).

We, of course, agree with the general statements that repeals by implication are not favored and that this result should not obtain if other reasonable construction is possible. We would, however, emphasize the word "reasonable." Statutes should not, of course, be distorted and their purpose frustrated in order to achieve a verbal consistency at the expense of defeating their evident purpose. It would rather be better to recognize the repugnancy, to the extent that it exists, and resolve the conflict as well as it may be done, in accordance with the objectives of the two statutes. *United States* v. *American Trucking Associations,* 310 U. S. 534, 542, et seq.

We respectfully urge that the district court also erred in failing to take note of the special nature of the Administrative Procedure Act, particularly, in

failing to give effect to the express provisions of section 12 which clearly shows the special status of this statute and the conferring of power upon agencies to do the things required by it.

We respectfully urge, for the reasons stated and on the authority of the legislative history and decisions previously cited that the *Stone's Express decision* should not have been regarded by the District Court as controlling the present case.

D. The Commission has held consistently that Section 9 (b) of the Administrative Procedure Act supersedes time limitations in the Interstate Commerce Act upon temporary authorities issued in the circumstances of this case

The Commission, early after the passage of the Administrative Procedure Act, adopted the interpretation of section 9 (b) with respect to temporary authorities issued under sections 210a (a) and 311 (a) here presented and has since consistently followed that interpretation. The first temporary authorities extended were those issued under section 210a (a) which began to expire 180 days after the expiration of the Second War Powers Act. The first orders extending temporary authorities in accordance with this interpretation were issued by Division 5 during the month of September 1947. In its Annual Report to Congress for the year 1947, page 111, the Commission brought this matter to the attention of the Congress in the following words:

> Since the expiration of the Second War Powers Act there has been a decrease in the filing of applications for temporary authority, which has been off-set by an increase in applications for permanent authority. When the

act expired March 31, 1947, temporary authorities were extended under section 210a (a) for a period of 180 days, or until September 27, 1947. We have further extended temporary authorities covered by 528 applications for corresponding permanent authority pending determination of such applications.

The Commission's Annual Report to the Congress for 1948, page 103, carried in a tabulation of the number of different kinds of applications filed by motor carriers, the following entry: "Extension of temporary authorities under section 9 (b) (5 U. S. C. 1008 (b))," listing a total of 782 for the year. The Annual Reports to Congress for subsequent years have contained similar information. On June 6, 1948, the Commission adopted and published in the Federal Register (13 F. R. 4150) rules governing the procedure for extending under section 9 (b) temporary authorities issued under sections 210a (a) and 311 (a) (Appendix B).

During the five years ending January 1, 1957, the Commission issued a total of 10,776 temporary authorities under sections 210a (a) and 311 (a), or an average of 2,055 per year. During this same period, it authorized the continuance beyond 180 days, until the determination of pending applications, 2,052 such operations, or an average of 412 per year. The operations thus authorized to be extended constituted approximately 19% of the number of temporary authorities granted. On January 1, 1957, operations were being conducted under 387 temporary authorities which, pursuant to section 9 (b), had been extended to periods in excess of 180 days.

The Civil Aeronautics Board, under section 416 of the Civil Aeronautics Act issues temporary exemptions for the operation of aircraft. These exemptions may be for a single flight, for a period of days or months, or for an indefinite period. The Board has interpreted section 9 (b) of the Administrative Procedure Act as applicable to such temporary exemptions, in a manner similar to the interpretation placed on section 9 (b) by this Commission. This is shown by its regulations governing the extension of exemptions under that provision published as Part 290, Title 14 of the Code of Federal Regulations. According to these regulations an exemption granted for a period of less than 180 days is regarded as applying to an operation not of a continuing nature and, inferentially, exemptions granted for periods of 180 days or more as applying to operations of a continuing nature. The latter would be licenses within the protection of section 9 (b) of the Administrative Procedure Act.

This long continued and consistent interpretation, not only by the Commission but also by the Civil Aeronautics Board, should be given great weight. Thus, in *United States* v. *American Trucking Associations,* 310 U. S. 534, 549, the court, in upholding the Commission's interpretation of the Motor Carrier Act, stated:

> In any case such interpretations are entitled to great weight. This is particularly true here where the interpretations involve "contemporaneous construction of a statute by men charged with the responsibility of setting its

machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress.

CONCLUSION

The Commission's order of October 28, 1955 is valid and lawful in all respects. The judgment of the district court should be reversed and the proceeding remanded to that court with directions to dismiss the complaint.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel,
JAMES A. MURRAY,
Associate General Counsel,
Attorneys for Interstate Commerce Commission,
Washington 25, D. C.

FEBRUARY 1957.

APPENDIX A

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 28th day of October, A. D. 1955

No. W–376 (Sub–No. 11)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE

No. W–376 (Sub–No. 12)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE (2)

It appearing, That by order of May 18, 1955, the Commission, division 4, granted Pan-Atlantic Steamship Corporation temporary authority to operate as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation (1) of passengers and commodities generally (a) from Philadelphia, Pa., Baltimore, Md., Charleston, S. C., Jacksonville and Miami, Fla., to Seattle, Wash., Portland, Oreg., San Francisco, Oakland, Alameda and Los Angeles Harbor, Calif., (b) from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor to Boston, Mass., New York Harbor, N. Y., Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (c) from Seattle and Portland to Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (2) of passengers between New Orleans, La., and Houston, Tex., on the one hand, and, on the other, Seattle, Portland, San Francisco,

Oakland, Alameda, Stockton and Los Angeles Harbor.

It further appearing, That there is a public need for continuance of the said water carrier service, that it is an activity of a continuing nature, and that this service corresponds in part with that which the carrier by application No. W-376 (Sub-No. 13) seeks a certificate of public convenience and necessity; and good cause appearing therefor:

It is ordered, That said carrier be, and it is hereby, authorized to continue to perform said water carrier service until further order of the Commission, but not beyond the time said application No. W-376 (Sub-No. 13) has been finally determined.

By the Commission, division 4.

[SEAL] HAROLD D. MCCOY, *Secretary*.

APPENDIX B

TITLE 49

PART 2—SPECIAL RULES OF PROCEDURE [REVISED]

Temporary Operating Authorities And Approvals

* * * * * *

§ 2.1 *Extension of temporary operating authority or approval.* The Commission will determine upon written request by any interested party, or it may determine upon its own initiative, whether under section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)):

(a) Any temporary operating authority granted under 210a (a) or 311 (a) of the Interstate Commerce Act (49 U. S. C. 310a (a), 911 (a)) is continued in force, beyond the expiration date specified in such temporary operating authority, until the determination of an application filed by the holder of such temporary operating authority for a certificate of public convenience and necessity or a permit to engage in operations authorized by such temporary operating authority.

(b) Any temporary approval granted under section 210a (b) or 311 (b) of the Interstate Commerce Act (49 U. S. C. 310a (b), 911 (b)), is continued in force, beyond the expiration date specified in such temporary approval, until the determination of the related application for approval of a consolidation or merger of the properties of two or more motor or water carriers or of a purchase, lease, or contract to operate the properties of one or more such carriers.

In order to afford sufficient time for consideration and action thereon, a written request for such a determination should be filed not later than 30 days

prior to expiration of the temporary operating authority or approval.

§ 2.2 *Definitions and interpretations.* In making the determination provided in § 2.1, the Commission will be guided by the following interpretations of the provisions of the 3d sentence of section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)), and of the provisions of section 210a (a) of the Interstate Commerce Act (49 U. S. C. 310a (a)):

(a) *Timely application.* An application for a certificate of public convenience and necessity or a permit filed in accordance with the applicable laws, regulations, and instructions, not later than 60 days after issuance of temporary authority for a period of 180 days or not later than 60 days after issuance of the first of a series of consecutive temporary authorities aggregating 180 days.

(b) *Sufficient application.* An application for a certificate of public convenience and necessity or a permit, which is in the form, contains the information, and is accompanied by the documents and exhibits required by the applicable laws, regulations, and instructions.

(c) *Aggregate of 180 days.* As used in section 210a (a) of the act and Commission notices and orders relating thereto, the term "for not more than an aggregate of one hundred and eighty days" means the total number of days of temporary authority which may be granted to a motor carrier under the provisions of that section of the act to meet a continuing need for a particular service.

(d) *Series of grants.* As relates to extensions of temporary authorities under section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)), only those grants of temporary authority for less than 180 days which have been approved to meet a

specific continuing need and which follow one after the other without interruption for a total of 180 days will be considered as a "series of consecutive temporary authorities aggregating 180 days."

(e) *Need considered not to be of a continuing nature.* Any need which is the basis of an operation authorized by a temporary authority or approval to be conducted for a period of less than an aggregate of 180 days is presumed not to be of a "continuing nature" unless the Commission otherwise expressly determines.

(f) *Final determination of application.* For the purpose of this section—(1) An application for a certificate or permit shall be considered to be "finally determined" (i) with respect to operations for which the certificate or permit is denied, upon the expiration of the period allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) with respect to operations for which the certificate or permit is granted, when the certificate or permit becomes effective.

(2) An application for approval of a consolidation or merger of the properties of two or more motor or water carriers, or of a purchase of the properties of one or more such carriers shall be considered to be "finally determined" (i) in the case of denial of such an application, upon the expiration of the period allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) in the case of approval of such an application, when the certificate or permit to

be transferred in connection with such application has been reissued in the name of the transferee and has become effective.

(3) An application for approval of a lease or contract to operate the properties of one or more motor or water carriers shall be considered to be "finally determined," (i) in the case of denial of such an application, upon the expiration of the period allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) in the case of approval of such an application, when the order approving such application becomes effective.

§ 2.3 *Additional grant for new need.* If the need for a particular service ceases and the temporary authority covering such need expires or is revoked and a new or separate need arises subsequent to such expiration or revocation, additional temporary authority for the 180-day aggregate, or for a shorter period, may be granted to the same carrier for the service notwithstanding the prior grant or grants. However, an application filed after the expiration or revocation of temporary authority for an aggregate of 180 days will be denied unless the facts clearly show that the application is in reality based on a new need and not on a continuation of the need on which the prior grant of authority was based.

§ 2.4 *Termination of temporary authority or approval.* Nothing in this part shall be construed as preventing the Commission from terminating at any time, in accordance with law, any temporary authority or approval, or any extension thereof under section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)).

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